MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Policies and Rules	)	MM Docket Nos.
Regarding Minority and	)	94-149 and 91-140
Female Ownership of Mass	)	
Media Facilities	)	

TO THE COMMISSION

COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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The Minority Media and Telecommunications Council ("MMTC") respectfully submits these Comments in support of policies which would dramatically enhance the opportunities of minorities to own communications properties.

I. The Commission Must Stay The Course, Notwithstanding Confusing Signals From Congress

In evaluating its longstanding commitment to minority ownership, the Commission must come to grips with the most unfortunate action of the current Congress to repeal the tax certificate policy. This policy was responsible for 2/3 of the minority owned broadcast facilities and virtually all of the minority owned cable facilities.

The Commission should not misconstrue Congress' action as disapproval of diversity or disapproval of Commission incentives for minority ownership. Although Congress could have proposed the elimination of the remaining FCC minority incentive programs, it chose not to do so. Telecommunications reform legislation now pending in the House and Senate does not propose the elimination of those policies. Nor did the legislative history of H.R. 831, the tax certificate repeal legislation, manifest any Congressional finding that minority ownership is not a desirable objective or that minority ownership incentives are of doubtful constitutionality. Nor has Congress ever suggested that the Commission should in any way relinquish the historic leadership role it enjoys in this area. That role remains appropriate for the Commission given its expertise, its public accessibility through the rulemaking process,

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1/ MMTC, founded in 1986, is the association of attorneys, scholars, engineers and economists which assists the civil rights community in communications policy matters. The views stated herein are those of MMTC itself and are not necessarily the views of any particular member of MMTC or its Board.

and its unwavering and nonpartisan support for minority ownership as a structural, content-neutral means of fostering diversity.2/

To this it must be added that Congress repealed this popular program by focusing on its tax implications.3/ Indeed, as President

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2/ In Deregulation of Radio (NPRM) 73 FCC2d 457, 482 (1979), the Commission reassured the public that "[e]fforts to promote minority ownership and EEO are underway and promise to bring about a more demographically representative radio industry." In adopting its ultimate rules in Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981) aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), the Commission held that "it may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of these groups is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." It explicitly concluded that the minority ownership policies and EEO rules, rather than direct regulation of broadcast content, were the preferable means to achieve diversification. Id. at 977.

See also Amendment of §73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), 75 FCC2d 587, 599 (1979) (separate statement of Chairman Ferris), aff'd sub nom. NAACP v. FCC, 682 F.2d 993 (D.C. Cir. 1982); Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments, Second Report and Order, 101 FCC2d 638, recon. denied, 59 Rad. Reg. 2d (P&F) 1221 (1985), aff'd sub nom. NBMC v. FCC, 822 F.2d 277 (2d Cir. 1987); Deletion of AM Acceptance Criteria in §73.37(e) of the Commission's Rules, 102 FCC2d 548, 558 (1985), recon denied, 4 FCC Rcd 5218 (1989); Nighttime Operations on Canadian, Mexican and Bahamian Clear Channels, 3 FCC Rcd 3597 (1988), recon. denied, 4 FCC Rcd 4711 (1989); cf. Revision of Radio Rules and Policies (Report and Order) (MM Docket 91-140), 7 FCC Rcd 2755, 2769-2770 ¶¶26-29 (1992) (relying on minority ownership policies to further diversification goals, even as the Commission deleted one of those policies, the Mickey Leland Rule.)

The courts have approved the Commission's reliance on minority ownership and EEO as preferred means of promoting diversity. NAACP v. FCC, supra, 682 F.2d at 1004 (D.C. Cir. 1982) (holding that the Commission "has not improperly exercised its discretion by relying on [its minority ownership, employment and programming policies] rather than the Top-Fifty Policy, to advance minority goals.")

3/ The legislation was aimed at a transaction involving Viacom, Inc., which would have been able to defer $400,000,000 in capital gains taxes as its reward for having spawned the creation of the world's largest Black owned business. Instead of receiving the congratulations it deserved, Viacom became the target of an incredibly vicious public furor. But the true objectives of opponents of the tax certificate policy became evident yesterday, when the Chairman of the House Ways and Means Committee signalled that he strongly opposed the repeal of $25 billion in tax breaks to large (essentially all White owned) businesses. See Christopher Georges and Jackie Calmes, "Attempt to End Business Breaks Fails in Congress," The Wall Street Journal, May 16, 1995, p. A3 (quoting House Ways and Means Committee spokesperson Ari Pleisher as saying "[t]his will not be the tax-raising committee of the United States government under Chairman Archer's watch.")

Clinton noted in his message accompanying the legislation, the legislation was enacted only because it was linked to perhaps the most popular piece of legislation to be enacted this year -- the health care deduction for the self-employed -- "must sign" legislation for any President just before the income tax deadline. See Statement by the President on H.R. 831, April 11, 1995.

The Commission should be guided by the principle that an agency must reevaluate its policies in light of fundamental changes in circumstances. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). The threat to minority ownership spawned by the repeal of the tax certificate policy could not manifest a more fundamental change in circumstances. The proposals advanced in the NPRM in this proceeding were designed as appropriate for a world in which the tax certificate policy was still alive. Given the tax certificate policy's demise, the Commission should be considerably more pro-active than it was in its otherwise excellent NPRM in developing and implementing programs to foster minority ownership.

In addition, the Commission should notice and anticipate even more profound threats to minority ownership than that presented by the repeal of the tax certificate policy. Foremost among these is the possible repeal of Section 310(b) of the Act, which would move wealthy foreign investors to the front of the line for station acquisitions.4/ In addition, congressional attempts to relax the national and local multiple ownership limitations will result in greater market concentration, benefitting the largest and strongest companies at the competitive expense of smaller, local, more

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4/ For a detailed analysis of the effect of the possible repeal of Section 310(b) on minority ownership, see the Comments of the Minority Media and Telecommunications Council in IB Docket No. 95-22 (filed March 28, 1995).

innovative and minority owned companies. Finally, the anticipated congressional assault on affirmative action, even if it spares the Commission's minority ownership and EEO programs, can only embolden nonminority broadcasters to reduce their recruitment and training programs, and in some cases to resume active discrimination. As minorities lose opportunities to learn the business, fewer will be in a position to move into station ownership.

Thus, the Commission must be extraordinarily firm in maintaining its commitment to civil rights. It should enact no rule, revise no rule, and repeal no rule without first making an affirmative finding, supported by hard research, that such action will not diminish opportunities for minority employment and ownership. To implement this policy, the Commission should delegate to the Office of Communications Business Opportunity the task of issuing a Minority Impact Statement as a predicate to Eighth Floor Review of any rulemaking (other than amendments to the Tables of FM and TV Allotments.

II. Justifications For The Minority Ownership Policies

A. Diversity

Research cited in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) ("Metro") unequivocally established that minority ownership is justifed in order to promote diversity of program service. This justification needs no further analysis, having been validated by the Supreme Court.

B. More Perfect Competition

Opportunities for inclusion of everyone with talent in an industry whose business in the creation and distribution of talent is unquestionably sound economic policy. Minority opportunity strengthens the economic base of the broadcasting and cable

industries in three ways. First, by enabling the minority segment of private industry to compete effectively in broadcast and cable ownership, the Commission increases the number of broadcast stations and cable systems which are operating successfully and serving the public. Second, these invigorated facilities create jobs which would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace. Third, new facilities owned by minorities and reaching heretofore underserved minority audiencies have a net positive effect on the ability of advertisers to reach the public.

C. Relief From Barriers To Capital Formation

As the Commission has noted in the PCS context[5/] and as NTIA recently found,[6/] severe barriers to capital formation, including discrimination, have prevented minorities from owning communications facilities. Certainly, minorities' lack of access to capital derives primarily from the effects of past servitude and discrimination on minorities' asset base. Another significant factor is the inexperience, impatience, and unwillingness of the financial community, brokers and others to trade with minorities -- partly as a result of their preexisting stereotypes. Voluntary government programs to overcome these barriers are certainly desirable and appropriate. MMTC warmly appreciates the Commission's highly principled actions to promote minority capital formation.

5/ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, FCC 94-178 (released July 15, 1994) at 40-49.

6/ See NTIA, "Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries," April, 1995, at 14-16.

D. Remedies For Official Discrimination

MMTC need not stand merely in the position of a supplicant, begging the Commission to adopt voluntary initiatives. Instead, it is time for the Commission to acknowledge that its minority ownership incentive programs are not only desirable instrument sof diversity policy, they are a constitutional imperative. They are compelled by the Equal Protection Clause of the 14th Amendment and the Due Process Clauses of the 14th and 5th amendments. These programs -- and much more -- are needed in order to compensate for a very long history of official actions which deprived minorities of any meaningful access to the radiofrequency spectrum -- a vast and valuable public resource which, for two generations, the FCC gave away for free to Whites only.

1. A Constitutionally Protected Right to Communicate

Through its deliberate actions and omissions over a period of 61 years, the Commission has caused the nation's airwaves to be almost completely segregated, with 99.5% of the broadcast industry's asset value held by nonminorities. Yet after broadcast deregulation in the early 1980's, nonminority licensees are no longer required to present the views of minorities. Nor -- although in recent years it has tried -- has the Commission fulfilled its mission of insuring that -- as a bare minimum requirement for the privilege of licensure, broadcast licensees at least provide equal employment opportunity.

Even in recent years, the Commission has too often failed to take advantage of the most facile opportunities to promote minority ownership. For example, the Commission has awarded virtually all of the 1605-1705 kHz AM expanded band to nonminorities, after a 20-year

battle by NBMC and the NAACP for minority access to this last remaining piece of radio spectrum. Just two weeks after Congress eliminated the tax certificate policy, the Commission announced plans to award all of the high definition TV spectrum to incumbent television station owners. On top of this, the Commission has announced its support for longer TV station license renewal terms. It has also urged Congress to eliminate comparative challenges to incumbent station owners at renewal time -- thus essentially guaranteeing licenses in perpetuity.7/

These detours from the central imperative of equal protection must cease forthwith. The Commission simply must stop administering a menu of policies whose cumulative net effect is the evisceration

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7/ This unfortunate proposal overlooks the fact that the constitutionality of the distress sale policy may well depend on the existence of comparative renewals. In Metro, 497 U.S. at 599, the Court explained:

> The distress sale policy is not a quota or fixed quantity set-aside. Indeed, the nonminority firm exercises control over wehether a distress sale will ever occur at all, because the policy operates only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in question have been filed with the Commission at the time of the designation. See Clarification of Distress Sale Policy, 44 Radio Reg. 2d (P&F) 479 (1978). Thus, a nomminority can prevent the distress sale procedures from ever being invoked by filing a competing application in a timely manner. (emphasis supplied; fn. omitted).

During the oral argument in Adarand Constructors, Inc. v. Peña, No. 93-1841 (Sup. Ct., argued January 17, 1995), Justice O'Connor expressed concern over the procedural hurdles faced by those wishing to challenge the genuineness of companies receiving benefits from federal affirmative subcontracting provisions. The comparative renewal procedure responds directly to Justice O'Connor's concern by enabling opponents of a distress sale to seek the license themselves.

of minority access to the radiofrequency spectrum.[8/]

The right in question -- access to and participation in the flow of information and thought[9/] -- is essential to the attainment or enjoyment of every other right, including education, housing, health care and civil liberties. Access to the media is now every bit as basic to citizenship, to culture, to political participation and to the existence of a democracy as was education in 1954, when Brown v. Board of Education, 347 U.S. 483, 493 (1954) ("Brown") was decided. Brown held that education's importance stemmed from two interrelated benefits: (1) education has traditionally been recognized as vital to the "presevation of a democratic system of government," Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) and (2) education is necesssary to prepare individuals to be self-reliant and self-sufficient participants in society. See Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). Albert Gore and Newt Gingrich, who agree on almost nothing else, would agree that the same can be said of communications: it, too, is a fundamental right.

8/ While the Commission still administers modest programs aimed at increasing minority ownership, these programs have had an almost trivial impact. There are few stations in "distress" and thus there have been no distress sales in two years. Only one television group owner, HSN, has legitimately availed itself of the Mickey Leland Rule. The roughly 70 remaining comparative hearings, now limited in any event to marginal FM's, ground to a halt after Bechtel, supra. See generally Von M. Hughes, "A Constitutional ane Quantitative Analysis of the Federal Communications Commission Minority Preferences," Working Paper, Harvard Law School and John F. Kennnedy School of Government, April, 1995.

9/ This right, which can be defined in various ways, is referred to herein as the "right to communicate." It inherently includes the reception and amplified transmission of thought.

2. How The FCC Denied Minorities An Opportunity To Communicate

The Commission, and no one else, is the custodian of the fundamental right to communicate because the Commission's role under the Communications Act is to provide for the "larger and more effective use of radio in the public interest," 47 U.S.C. §303(g).

Yet the Commission, through deliberate actions and omissions, has prevented minorities from enjoying the extraordinarily important right to communicate. The Commission has knowingly adopted policies cumulatively likely to cause a return to spectrum segregation and has refused to guard against such segregation. This has to stop. See Swann v. Charlotte-Mecklenburg Board of Education, 334 F.Supp. 623 (1971) (school board cannot knowingly adopt pupil assignment policies likely to cause school resegregation, even if the policies have educational purposes); Office of Communication of the United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977) (preventing FCC from relaxing the broadcast EEO rule because unequal opportunity continued to significantly characterize the broadcasting industry). A prime example is the FCC's post-deregulation regime, under which licensees can elect not to serve minorities if at least one other licensee (e.g., a minority owner, usually with inferior technical facilities) elects to serve them. This has created a dual system of communication, with inferior minority owned and programmed facilities on the one hand and superior majority owned facilities on the other. This is "separate but equal" broadcasting, with the inferior minority owned facilities being "inherently unequal." Brown at 495; see Gilmore v. City of Montgomery, Alabama, 417 U.S. 456 (1974) (dual school system perpetuated by state action).

Courts routinely impose affirmative school integration obligations on municipal school systems, readily rejecting "freedom of choice" plans. But the Commission has not even adopted the analogue to a "freedom of choice" plan. For example, the tax certificate policy, analogous to a subsidy to White homeowners to sell their houses to minorities, hardly would be considered an effective way to promote housing integration. The distress sale policy, akin to a plan to authorize convicted drug dealers to avoid prison by selling their crack houses to minorities, does little to transfer significant assets to minorities. The comparative hearing preference policy is analogous to a slightly weighted lottery to fill the last 70 spaces in a university's freshman class from among 200 White and 50 minority applicants, where all but 320 of the remaining 12,000 students are White. No court supervising a state university's desegregation plan would deem this a meaningful remedy. In other areas of life (e.g., police and fire departments and the military) dramatic steps have been taken toward desegregation. But in broadcasting, less than 0.5% of the asset value is held by minorities.

Why do minorities own so little of this industry when the underlying spectrum was given away for free? Why, in 1978, when the Commission adopted the tax certificate and distress sale policies, did minorities owned only sixty small radio stations, four cable TV systems and one television station? Why was it not until 1956 that the first minority owned radio station came into being, and not until 1973 that the first minority owned television station came into being? Why was it not until 1974 that the Commission first awarded a new radio station license to a minority company the same way it had awarded tens of billions of dollars worth of broadcast

spectrum to Whites -- for free, after an Commission comparative hearing against other applicants? Why has the Commission managed to hand out construction permits to build all of the nation's television station licenses, with only two going to minorities?

Unquestionably, as noted above, minorities' lack of capital contributed to their near-exclusion from holding broadcast licenses. African Americans, in particular, are still handicapped by a six to one per-family savings disparity with Whites, a condition caused by 250 years of slavery and another 130 years of state sponsored segregation and discrimination.

"Societal discrimination" also surely helped keep minorities out of broadcasting. The roughly 150 broadcast station brokers are entirely unregulated, lacking even a self-regulatory body and a code of ethical conduct. Not one is a minority, and few of them make it their habit to invite minority guests along on the golf junkets at which broadcast deals are commonly arranged.10/

Lack of capital and societal discrimination are important factors in minority exclusion from broadcasting. But these factors do not begin to explain why so few minorities own broadcast

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10/ This writer, who in his private capacity has represented minority broadcasters and broadcast applicants for over eleven years, has yet to receive a call from a broker offering a station valued at more than $1,500,000. But he frequently receives calls like this: "My client has a 1,000 watt AM daytimer on 1590 khz, outside any major market, with a four tower array and a transmitter built in 1952. It's nearly in Chapter 11 status and it's been on the market for nine months. This would be a good deal for a minority trying to get into the business for the first time." This is the prototypical "dog" station, probably hemorraging so badly that the owner should give it away just to be relieved of the cash drain. On receiving such a call from a broker, this writer has learned to ask "I guess you couldn't find any White people to buy it?" But minorities do buy these second-class stations. Many are so hungry to break into station ownership that they pay far too much for the privilege. As a result, minority owned stations tend to have inferior facilities, like AM standalones at the high end of the dial. In virtually every major city today, a stranger can easily find the Black owned or Hispanic owned station by turning on her AM radio to 1600 kHz and scanning down the band from there.

stations. Throughout the past 50 years, when most of the broadcast licenses were being handed out by the Commission, minority families have owned 10-15% of the homes in the United States. They have accomplished this despite hiring, wage, housing, school, insurance and lending discrimination, and despite their collective shortage of capital.

Moreover, throughout the past 50 years, minorities have always owned 250 to 350 weekly newspapers. Until the advant of desktop publishing, weekly newspapers required about the same amount of startup funds as radio stations. Indeed, in the 1920's, newspaper owners largely built the radio industry, because the same skills needed to run a newspaper were also needed to run a radio station.

If even a few minority owned newspaper owners had obtained broadcasting licenses in the 1940's, we would almost surely enjoy a broadcast spectrum with many times the number of minority occupants as there are today. But that was impossible. The Commission's deliberate and notorious anti-minority policies would have made a minority owned venture, formed to obtain broadcast licenses, a foolish investment indeed.

For years, the Commission openly tolerated and ratified discriminatory actions of its licensees which served to exclude minorities from obtaining either the assets or the skills needed to be broadcasters. As it handed out virtually all of the virgin broadcast spectrum to Whites free of charge, the Commission relied heavily on competing applicants' "broadcast experience" in awarding new licenses. Yet for several decades, broadcast training was denied to minorities throughout the south <u>as a matter of law</u>. State universities were legally barred from admitting them. State owned public broadcasting authorities refused to hire or train them.

State legislatures denied Black state colleges the funds to start broadcasting programs or to apply for broadcasting station licenses.

The Commission must have known this, for two reasons.

First, as an expert agency, it can be presumed to be familiar with the policies of its licensees. FCC commissioners regularly speak to state broadcast associations. Some of the commissioners must have noticed that no Black persons were in attendance at these meetings even in the capacity of station staff.

Second, the Commission was very familiar with discrimination because it was a leading discriminator. Until the 1960's, no Black lawyer or engineer served on the Commission's staff. Commissioner Clifford Durr, appointed in 1941, noticed this and protested internally. He was dismissed as being ahead of his time.11/

Thus, it is unsurprising, although deeply troubling, that the Commission routinely provided broadcast licenses to colleges and universities which were segregated by law, such as WBKY-FM, University of Kentucky, licensed in 1941, WUNC-FM, University of North Carolina, licensed in 1952, and KUT-FM, University of Texas, licensed in 1957, among dozens of others.

These institutions' segregated policies helped ensure that a generation of minorities would be denied the skills required to enter the broadcasting industry -- thanks to the Commission's full endorsement and ratification, manifested by the exclusive right to use a scarce public resource. These skills were both a practical

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11/ Commissioner Durr was probably the most remarkable person ever to serve on the Commission. After returning to his native Alabama in 1948, he and his wife Viginia distinguished themselves as leading supporters of the Montgomery bus boycott and as teachers of a generation of civil rights leaders. As far as this writer is aware, no other member of the Commission raised the hiring discrimination issue again until Commissioner Kenneth Cox persuaded the Commission to hire its first Black professionals in the early 1960's.

necessity and a critical comparative factor in the Commission's decisions on who should be awarded a broadcast license.

One might think that the Commission's "character qualifications" test, long part of the "public interest" standard in Sections 307 and 309 of the Communications Act, would have required the denial of segregationists' broadcast applications on character grounds. Incredibly, the reverse was true. Faced with an irreconcilable conflict between its own law and state segregation laws, the Commission gave full faith and credit to the state segregation laws.

This bizarre and probably unique inversion of federal supremacy was articulated in Southland Television Co., 10 RR 699, recon denied, 20 FCC 159 (1955). The Commission had to decide which of three applicants would be granted a construction permit which would confer -- for free -- millions of dollars of spectrum space to be used to construct a VHF television station in Shreveport, Louisiana.

One of the applicants, Southland Television, was headed by Don George. Mr. George's business was movie theater ownership. Louisiana law governing movie theaters assumed that the theaters had two stories, like the 19th century opera houses on which they were modelled. The law required the admission of all races to theaters so long as the theater owners restricted each story to members of a particular race.12/

12/ The law was thought at the time to be race-neutral because the theater owners, rather than the state, decided which race was consigned to which story of the theaters. But every Black person over 40 who ever climbed a set of stairs remembers which story was the Black story.

Mr. George did not want Blacks in his theaters at all. Ironically, he was hampered by the literal language of the Louisiana movie theater segregation law. To circumvent the law, he built Louisiana's first one-story movie theaters, and he operated Louisiana's only Whites-only drive-in theaters.13/

One of the competitors for the TV license, Shreveport Television, was the first TV station applicant to include Black stockholders.

Shreveport Television noted that Mr. George's application contemplated construction of a studio for live broadcasts. Shreveport Television asked the Commission to disqualify Mr. George's company from holding a broadcast license because, based on Mr. George's history of movie theater operations, he could be expected to deny Blacks the opportunity to be seated in the studio audiences of live productions at the television station.14/

The Commission was unmoved. It held that it lacked evidence that "any Louisiana theatres admit Negroes to the first floor" of theaters, nor any evidence that "such admission would be legal under the laws of that state." Id., 10 RR at 750. Thus did the Commission give full faith and credit to state segregation laws and to broadcasters' deliberate efforts to evade even the weakest state

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13/ Other Louisiana drive-in theaters enforced segregation only within each automobile, to discourage miscegenation.

14/ Since videotape was not invented until 1956, television broadcasts were done before live audiences, in studios set up to resemble miniature movie theaters. Southland Television proposed to have a balcony in its studio.

laws permitting some integration.15/

In the 1960's, the civil rights movement hardly left the Commission untouched. But its response to the cry for freedom reflected timidity and hostility, in stark contrast to the forthright efforts of other agencies of the Kennedy and Johnson administrations.

The first test of where the Commission stood on civil rights came in Broward County Broadcasting, 1 RR2d 294 (1963). The case involved a new AM radio station, WIXX. The station was licensed to and situated in Oakland Park, a suburb adjacent to Ft. Lauderdale. The very large Black population in Ft. Lauderdale received no Black oriented programming from any station. Consequently, WIXX decided to devote its program schedule to Black-oriented news, public affairs and music. Id. at 296.

The City of Oakland Park complained to the Commission that WIXX was offering a format which the city did not need or want because "the Negro population to be catered to all reside beyond the corporate limits of Oakland Park." Id. at 294. The city government was fearful that Black professionals, once hired by WIXX to produce its programming, might choose to buy homes near their jobs.

15/ Recall that this challenge was launched in Shreveport, Louisiana one year after Brown. At the time, the Ku Klux Klan and the White Citizens Council were the two most important political and organizations in northern Louisiana -- and, as noted above, the Commission still employed no Black lawyers or engineers. Imagine the extraordinary courage of the challenging applicant and its law firm (Arent Fox) in even propounding this argument to the Commission.

Obviously, the Commission had no business regulating program formats.16/ Instead, it threw the station into a revocation hearing in which it could have lost its license. The station's crime was that it had changed its programming plans from the "general audience" schedule originally proposed in its licensing application -- a "character" violation.

Faced with the probable loss of its license, the station dropped most of its Black programming. The Commission thereupon quietly dropped the charges -- proving that its interest wasn't the licensee's "character" at all, which could hardly have been mitigated by "compliance" after a hearing was designated.17/

Two years later, in The Columbus Broadcasting Company, Inc., 40 FCC 641 (1965), the Commission was faced with a radio licensee who had used his station "to incite to riot...or to prevent by unlawful means, the implementation of a court order" requiring the University of Mississippi to enroll James Meredith. After

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16/ Eighteen years later, the Supreme Court held that the Commission may not regulate program formats. FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). But even in 1963, the Commission had only rarely sanctioned a licensee for offering one format over another. The only other reported cases arose in the late 1930's. Blissfully unaware that World War II was about to occur, and filled with the anti-semitism rampant at the time, the Commission denied three applications by the only applicants for their respective radio licenses because the applicants proposed to broadcast some of their schedules in "foreign languages" -- code for Yiddish, the language commonly used by Jewish refugees from Germany and Poland. In Voice of Detroit, Inc., 6 FCC 363, 372-73 (1938), the Commission held that "the need for equitable distribution of [radio] facilities throughout the country is too great to grant broadcast station licenses for the purpose of rendering service to such a limited group...the emphasis placed by this applicant upon making available his facilities to restricted groups of the public does not indicate that the service of the proposed station would be in the public interest." See also Chicago Broadcasting Ass'n., 3 FCC 277, 280 (1936) and Voice of Brooklyn, 8 FCC 230, 248 (1940). Thus, under the Commission's pre-war jurisprudence, none but WASPs could hope for access to the public airwaves.

17/ Today, the radio station which figured in Broward County Broadcasting, now WRBD(AM), is now Black owned and 100% Black programmed.

President Kennedy federalized the National Guard in anticipation of violence on Mr. Meredith's fourth attempt to enroll, the radio station called upon its listeners to go to Oxford and assemble to prevent Mr. Meredith's enrollment. Hundreds answered the call, and two people died in the ensuing riot.

Yet the Commission merely "admonished" the station, ignoring the obvious fact that broadcast licenses are not awarded so they can be used to incite riots. Illustrating how out of step the Commission was with the federal government's civil rights policies of the day, the losing complainant in Columbus was none other than the Federal Bureau of Investigation, then headed by that great friend of civil rights, J. Edgar Hoover.

The federal courts soon lost patience with the Commission's racist policies. In the landmark case of Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) ("UCC I") the Court of Appeals ordered the Commission to hold a hearing on the license renewal of a Jackson, Mississippi station, WLBT-TV, which only broadcast the White Citizens Council's viewpoint on civil rights. WLBT-TV went so far as to censor its own network news feeds with a "Sorry, Cable Trouble" sign when NAACP General Counsel Thurgood Marshall was being interviewed. Id. at 998.

After a very one-sided hearing, the Commission renewed WLBT-TV's license again. On appeal again, the Court ordered the Commission to deny WLBT's license renewal. The Court had never before taken such an action, but this time it held the administrative record to be "beyond repair." Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 550 (D.C. Cir. 1969) ("UCC II").

The Commission's new antidiscrimination policy -- imposed by the court in UCC II -- was applied haltingly and sporadically. In Chapman Television and Radio Co., 24 FCC2d 282 (1970), the Commission had before it several applicants seeking construction permits to operate on Channel 21 in Birmingham, Alabama. One applicant, Alabama Television, had as a 16.2% stockholder John Jemison. Mr. Jemison, who owned a Birmingham cemetery, had participated in the cemetery's 1954 decision to continue its policy, adopted in 1906, of excluding Blacks.

The cemetery's policy came to light when the cemetery turned away the body of a Black soldier killed in Vietnam. Yet the Commission found "extenuating circumstances" in the applicant's claim that the cemetery would have been sued by White cemetery plot owners.18/ Thus, the Commission ordered a hearing -- but framed the issues to focus only on why the applicant had covered the matter up, not whether a rabid segregationist had the moral character to be a federal licensee. Even the cover-up allegations were thrown out by the Hearing Examiner, who held that "in today's climate it is not at all an oddity for political leadership to appear to buckle before irresponsible and only half true racism charges." Chapman Radio and Television Co., 21 RR2d 887, 895 (Examiner, 1971).

Southland TV, discussed above, was one of the first television comparative hearings, and Chapman was among the last. Today, all of the television spectrum in the United States has long

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18/ Twenty-two years earlier, the Supreme Court had ruled that restrictive covenants were unenforcable. Hurd v. Hodge, 334 U.S. 24 (1948). Hurd involved housing. Occupants of houses are typically more likely than occupants of cemeteries to be concerned about their neighbors' race. A fortiori, the Commission's holding in Chapman was ridiculous.

since been handed out. Minority owned companies received exactly two of these free television licenses. In effect, the Commission presided over a 100% set-aside for Whites. That is why today's Commission, seeking to enable at least a few minorities to own stations, is compelled to focus on opportunities for minorities to buy their way in.

Minority ownership is not the Commission's only tool to foster diversity of voices. In 1968, the Commission adopted a nondiscrimination rule for its broadcast licensees. It was spurred by the Report of the National Advisory Commission on Civil Disorders (1968) (the "Kerner Report") which found that minority underemployment in the media contributed to the climate of intolerance and misunderstanding which fostered civil disorders. See Nondiscrimination in the Employment Practices of Broadcast Licensees ("Nondiscrimination in Broadcasting"), 13 FCC2d 766 (1968). When it issued Nondiscrimination in Broadcasting, the Commission mailed Chapter 15 of the Kerner Report to every broadcast licensee. Id. at 775.

The Commission's EEO rule, which since 1969 has included a very modest, efforts-based affirmative action component, has been held justified by the Supreme Court as useful in fostering diversity in program service. NAACP v. Federal Power Commission, 425 U.S. 662, 670 n. 7 (1976).

Yet the Commission's enforcement of its EEO rule has been spotty at best. Only two cable companies have ever been fined for EEO violations. While several broadcast licensees have been fined for EEO violations, not one has lost its license for discrimination. Progress has come largely as a result of court decisions striking down indefensible Commission practices.

Beaumont Branch of the NAACP v. FCC, 854 F2d 501 (D.C. Cir. 1988), provides a classic example. In 1981, Pyle Communications, which owned KIEZ(AM) and KWIC-FM in Beaumont, Texas, changed KIEZ's format from Black to country and western. Pyle then fired the Black members of the staff -- even the secretaries and salespeople -- without giving them a chance to try out in the new format. At first, Pyle told the Commission that the Black employees had left voluntarily. However, the NAACP used Pyle's own payroll records to show that every time a Black employee had "resigned", a White person had been hired that day or a day earlier to do the same job. Confronted with this evidence, Pyle changed its story, now maintaining that the Black employees had been incompetent. Id. at 505.

The Commission accepted Pyle's second version of the facts and refused to hold a hearing. The Court of Appeals had little difficulty reversing and remanding for trial, holding that Pyle's conflicting stories should have tipped off the Commission to possible race discrimination.

It required twenty years of EEO jurisprudence before the Commission ruled, for the first time, that a broadcast station had engaged in employment discrimination. The case involved tiny WBUZ(AM) in Fredonia, New York, which operated on 250 watts, the lowest power authorized. Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553 (1989).19/

19/ (n. 19 is on p. 22)

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Governmental involvement in discrimination may justify or require affirmative action, even under "strict scrutiny." See City of Richmond v. Croson Co., 488 U.S. 469 (1989). Therefore, while the minority ownership policies are amply justified to promote diversity under intermediate scrutiny,20/ they are constitutionally compelled by the need to redress two generations of Commission acquiescence in discrimination -- discrimination which continues to deprive minorities of the assets and expertise they need to reach the mainstream of America's most important industry.

19/ Catoctin should have been a no-brainer. In 1980, Henry Serafin, the owner of WBUZ(AM), asked the Buffalo CETA office to send over a secretarial applicant. CETA sent Linda Johnson. Although Ms. Johnson was well qualified, Serafin did not interview her. Instead, he called CETA counselor Cheryl Gawronski and asked "don't you have any white girls to send me?" adding that Ms. Johnson "would make charcoal look white." Id. at 2555.

Yet the Commission inexplicably relied only on Serafin's misrepresentations at trial to deny renewal, holding that his discrimination against Ms. Johnson, and one other factor, "only reinforce the conclusion" that Catoctin was unqualified. The other factor which "reinforce[d]" that conclusion, and which the Commission apparently deemed to weigh the same as discrimination, was WBUZ' failure to award a $200 stereo receiver as a prize in a contest. It took four and a half years from the date of the discrimination for the case to be designated for hearing, and another four years before the license renewal was denied. Id. at 2557-58.

20/ The minority ownership policies are not required to be "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination in order to be deemed constitutional. In Metro, the Supreme Court upheld as contitutional the Commission's distress sale and comparative hearing preference policies despite finding that such measures were not "remedial." Specifically, the Metro Court held that benign race-conscious measures mandated by Congress -- even though those measures were not "remedial" -- are constititionally permissible to the extent that they serve important governmental objecties within the power of Congress and are substantially related to achievement of those objectives. Id. at 564-65. The Metro Court found that, based on a record of empirical evidence demonstrating a nexus between minority ownership and diversity in programming, the Commission's minority ownership policies serve the important governmental interests of the First Amendment.

III. The Existing Minority Ownership Policies

The distress sale policy, the Mickey Leland Rule, and comparative hearing preference policy have proven easy to manage and cost-effective, albeit of slight impact.

There have been very few abuses of the minority ownership policies, especially when compared to other business assistance programs operated by governments. The petition to deny and comparative hearing processes have enabled the Commission to curtail most abuses.

The policies have not materially inhibited the ability of nonminorities to become broadcast licensees. Instead, by contributing to the economic strength of the broadcasting business (see pp. 4-5 supra), these policies have helped "lift all boats", including the boats of nonminority broadcasters.

IV. The Interplay Of The Commission's Proposals In This Docket With The Multiple Ownership NPRM

There is little point in going to the trouble to enact and defend minority ownership policies if those policies will have no meaningful impact on minority ownership. The NPRM's incubator and attribution proposals, discussed infra, require an audience cap and related multiple ownership limitations in order to succeed. Absent these regulations, the incubator and attribution policies will be virtually worthless. The general lack of success of the Mickey Leland Rule demonstrates the consequences of basing an incentive program on the existence of an ownership limit which is set too high.

V. The Commission's New Minority Ownership Proposals

The new proposals advanced in the NPRM should be noncontroversial, and thus MMTC comments on them only briefly.